No. 89-167

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

INSURANCE COMPANY OF AMERICA, et al.,
Petitioner,

v.

J.S. DARST, INSURANCE COMMISSIONER, STATE OF WEST VIRGINIA, STATE OF FLORIDA, WILLIAM GUNTER, COMMISSIONER, DEPARTMENT OF INSURANCE AND TREASURER; STATE OF CONNECTICUT AND PETER W. GILLIES, INSURANCE COMMISSIONER; ROBERT D. HAASE, COMMISSIONER OF INSURANCE STATE OF WISCONSIN; AND WILLIAM D. HAGER, COMMISSIONER OF INSURANCE, STATE OF IOWA,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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LIST OF PARTIES AND RULE 28.1 LIST

The parties to the proceeding below were Petitioner Insurance Corporation of America and respondents (collectively the "Respondents") the State of Florida, William Gunter, Commissioner, Department of Insurance and Treasurer; State of Connecticut and Peter F. Kelly, Insurance Commissioner; Robert D. Haase, Commissioner of Insurance, State of Wisconsin; and William D. Hager, Commissioner of Insurance, State of Iowa.

In addition, the following parties did not enter appearances but were listed as plaintiffs in the underlying proceedings because of their position as plaintiffs in the original proceedings giving rise to the orders that are the subject of this dispute: Pocahontas Insurance & Trust Co.; Pocahontas Insurance Co.; Firstcorp Insurance Group. Similarly, respondent J. S. Darst has not entered an appearance, and was listed as defendant in the underlying proceedings solely because he was named as the primary defendant in the proceedings from which the orders in dispute originated. The parent corporation of Insurance Corporation of America is Principle Holding Corporation, a Delaware corporation.

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The fundamental issue presented by this petition is whether properly certified copies of final court orders and judgments bear a presumption of authenticity which, upon introduction of such documents into evidence, shifts the burden to the party opposing enforcement to introduce evidence rebutting the presumption. In their Brief in Opposition, the Respondents fail to directly address this issue, or to respond to Petitioner's argument that the Magistrate's ruling completely undermines the integrity of court orders generally.

STATEMENT OF THE CASE

In their "Statement of the Case", Respondents direct the Court's attention to a list of "pertinent facts", which, they imply, are "undisputed". Respondents go so far as to claim that these "facts" were "not refuted at trial". Respondents' "undisputed facts" are, however, nothing more than arguments that Respondents posit as a basis for denial of the Petition. To represent that these so-called "facts" are "undisputed" is grossly misleading. Petitioner has throughout the pendency of this matter refuted Respondents' claims. Had the burden of proof been properly assigned at trial, Petitioner would have offered evidence in direct response to these claims. As it happened, however, much of Petitioner's evidence was excluded by the Magistrate as improper rebuttal evidence – evidence more properly introduced in Petitioner's case in chief. *See, e.g.*, App. at 318-322; Petition for Writ of Certiorari, at 8-9. The exclusion of this evidence was the direct result of the Magistrate's erroneous rulings on the burden of proof.

The remainder of this reply will address new arguments set forth in the Respondents' Brief in Opposition, including those reasons or arguments advanced in Respondents' Statement of the Case.

RESPONDENTS' "REASONS FOR DENIAL OF THE PETITION" ARE WITHOUT MERIT

At Page 1 of their Brief in Opposition, Respondents make much of the fact that the Orders as offered at trial bore neither a file stamp, nor a docket number from the Federal District Court for the District of Columbia, or from the Delaware District Court. On the issue before this Court, however, such contentions are of no significance.

Respondents' assertions simply do not address the issues presented by the Petition. The essential question presented for review is not, at this stage, the actual

authenticity or enforceability of the Orders themselves. Rather, the question is which party should bear the burden of introducing, in the *first* instance, evidence extrinsic to the Orders that refutes – or confirms – their authenticity. Fundamental to this issue is the compelling societal interest in the integrity, certainty and finality of judgments and orders. Respondents' reliance upon the absence of docket numbers and such other issues in no way diminishes the importance of these questions.

Respondents next take up the question of the so-called "anomalies" in the two Orders, and state simply that they were not refuted at trial. Again, Respondents have not addressed the basic issue before this Court. Rather, Respondents are presumably suggesting that if "anomalies" exist and are unrefuted, that somehow this answers the question of the shifting of the burden of proof. Indeed, at trial Respondents offered nothing but their own arguments to support their conclusion that the "anomalies", in and of themselves are sufficient to demonstrate a lack of authenticity. Although precluded from offering certain of its evidence by the Magistrate's improper allocation of the burden, Petitioner's expert witness, Professor Surrency, unequivocally testified that the Orders are authentic. This direct, expert conclusion remains, to date, unrebutted by the Respondents.

Respondents have done one other thing which Petitioner suggests is flagrantly misleading, and, in any event, irrelevant. They have included in their Brief in Opposition, references to Orders and opinions rendered by the United States Court of Appeals for the Ninth Circuit, arising in the context of a motion for injunctive relief, and a motion for disciplinary sanctions. If the California decisions were relevant at all to the issues before this Court, then Respondents might have been heard to argue collateral estoppel. No such argument has ever been made by Respondents.

Rather, Respondents' ploy is to place before the Court statements that are in essence dicta, issued in cases where the question of authenticity was not squarely presented. There was no "decision on the merits" in the Ninth Circuit, as apparently claimed by the Respondents. As the Respondents well know, no evidence was presented in the California Courts on the question of the authenticity of the documents, and, in fact, there was not even any discovery conducted. *Kremer v. Chemical Construction Corporation*, 456 U.S. 461 (1982). As a consequence, the question of the burden of proof, which is before this Court, was never considered by the California Courts. One can only conjecture that Respondents at this late date are citing the California matters in a last ditch effort to unfairly prejudice the Petitioner before this Court.

CONCLUSION

Petitioner seeks the issuance of a Writ of Certiorari based upon serious and wrongful interpretations of law by the trial court. Defendants in response have chosen to rely on irrelevant matters rather than address the basic issues raised by Petitioner. Petitioner, having demonstrated the validity of its position with respect to the basic issues before this Court, it follows that the Court should grant the Writ sought.

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September 18, 1989

CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of September, 1989, three copies of the foregoing Petitioner's Reply to Respondents' Brief in Opposition to Petition were mailed, first class postage paid, to the following:

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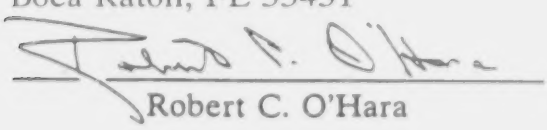

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